UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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NICOLA NUCCI,

Plaintiff,

-against-

PHH MORTGAGE CORPORATION,

Defendant.
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REPORT AND RECOMMENDATION

14 CV 2683 (NGG)(RML)

LEVY, United States Magistrate Judge:

Plaintiff pro se Nicola Nucci ("plaintiff") commenced this action in New York State Supreme Court, Kings County, on February 27, 2014. (Notice of Removal, dated Apr. 29, 2014 ("Notice of Removal"), ¶ 1.) Defendant TD Bank, N.A. ("TD Bank")[1] removed the action to this court on April 29, 2014. (Id. at 1.) Defendant PHH Mortgage Corporation ("defendant") now moves to dismiss the complaint pursuant to FED. R. CIV. P. 12(b)(6). (Motion to Dismiss, dated May 15, 2015 ("Def.'s Mot.").) By order dated October 6, 2015, the Honorable Nicholas G. Garaufis, United States District Judge, referred defendant's motion to me for a Report and Recommendation. (Order, dated Oct. 6, 2015.) For the reasons stated below, I respectfully recommend that defendant's motion be granted.

BACKGROUND AND FACTS

Plaintiff brought this action in February 2014 against defendants TD Bank and PHH Mortgage Corporation. (Complaint, dated Feb. 24, 2014 ("Compl."), annexed to the Notice

[1] The complaint names defendant Commerce Bank, N.A., not TD Bank. TD Bank is the successor in interest to Commerce Bank, N.A. (Defendant PHH Mortgage Corporation's Memorandum of Law in Opposition to Plaintiff's Motion for Remand, dated Aug. 5, 2014, at 7.)

of Removal as Ex. A.) It was removed to this court in April 2014, pursuant to 28 U.S.C. §§ 1332(a)(1) and 1441(a). (Notice of Removal ¶ 3.) Plaintiff has stipulated to dismiss TD Bank from the action. (Stipulation of Voluntary Discontinuance, dated May 23, 2014.)

Plaintiff is the owner of real property at 762 39th Street in Brooklyn, New York (the "Property"). (Compl. ¶ 1.) Attached to the complaint is a publicly recorded "Consolidation, Extension, and Modification Agreement" between plaintiff, defendant, and defendant's nominee as the mortgagee of record, Mortgage Electronic Registration Systems, Inc. ("MERS").[2] (Consolidation, Extension, and Modification Agreement, dated Dec. 20, 2005 (the "CEMA"), annexed to the Complaint as Ex. B.) The CEMA relates to mortgages encumbering the Property and the promissory notes they secure. (See CEMA.) It bears the signatures of plaintiff, the borrower and mortgagor; a representative of defendant, the lender; and a representative of MERS, defendant's nominee as mortgagee of record. (Id. at 33.)[3] Incorporated into the CEMA is a list of the mortgages and promissory notes that are affected. (See List of Mortgages, Notes, and Agreement, annexed to the CEMA as Ex. A.) Pertinently, the list indicates that two mortgages[4] and the promissory notes they secure are to be consolidated and amended pursuant to the CEMA, forming "a single lien of $413,352.80." (Id.) These are: (1) a September 12, 2003 mortgage made by plaintiff and Elias Falero to MERS as nominee for Fleet National Bank, securing a promissory note with an unpaid principal balance of $398,074.63; and (2) a December 20, 2005 mortgage made by plaintiff to defendant, securing a promissory note in the sum of $15,278.17. (Id.) Also incorporated into the CEMA is an amended promissory note, "given in substitution for [] the notes described" above. (Amended Note, dated Dec. 20, 2005 ("Amended Note"), annexed to the CEMA as Ex. C.) The Amended Note, dated December 20, 2005, bears plaintiff's signature and prescribes the terms of his promise to pay a principal amount of $413,352.80. (Id.) Finally, incorporated into the CEMA is a consolidated mortgage, dated December 20, 2005. (Consolidated Mortgage, dated Dec. 20, 2005 ("Consolidated Mortgage"), annexed to the CEMA as Ex. D.) This instrument encumbers the Property and secures the Amended Note. (Id. at 41-43.) The terms of the Consolidated Mortgage indicate that MERS is defendant's nominee as the mortgagee of record. (Id. at 41.) The version of this document that plaintiff has submitted to the court is unsigned.[5] (Id. at 55.)

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[2] For a general description of the function and operation of MERS, see 1 D. Kirk Drussel, et al., Mortgages and Mortgage Foreclosure in N.Y. § 8.4.

[3] The exhibits annexed to the complaint are not clearly numbered. Therefore, in addressing these exhibits, the court directs the reader to the page number of the ECF filing where the referenced information may be found.

[4] The list in its entirety includes three mortgages and two notes, but indicates that "Mortgage (2) is a correction Mortgage." (List of Mortgages, Notes, and Agreement, attached to the CEMA as Ex. A.)

The complaint sets forth a single cause of action to quiet title, in support of which plaintiff invokes common law causes of action, equitable doctrines, and New York State statutes. (Compl. at 3, ¶ 14.) Plaintiff raises these claims, in essence, as hypothetical defenses to a foreclosure by defendant, requesting, inter alia, a declaration that defendant "is forever barred from the equitable remedy of foreclosure." (Id. ¶ 19(3).)

On May 12, 2014, plaintiff moved to remand this action to New York State Supreme Court, Kings County. (Motion to Remand, dated May 8, 2014.) On August 21, 2014, plaintiff moved for entry of default and default judgment against defendant. (Plaintiff's Motion for Entry of Default, dated Aug. 21, 2014; Plaintiff's Motion for Default Judgment, dated Aug. 21, 2014.) Judge Garaufis denied that motion on September 3, 2014 and, on March 31, 2015, denied plaintiff's motion to remand. (Order, dated Sept. 3, 2014; Order, dated Mar. 31, 2015.) Defendant filed its fully-briefed motion to dismiss the complaint on August 17, 2015. (Def.'s Mot.) On October 8, 2015, Judge Garaufis referred defendant's motion to me for a Report and Recommendation. (Order, dated Oct. 8, 2015.)

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[5] Also attached to the complaint is a credit line mortgage made by plaintiff to Commerce Bank, N.A., and an assignment of rents made between plaintiff and Commerce Bank, N.A. (See Credit Line Mortgage, dated May 12, 2008, annexed to the Complaint as Ex. C; Assignment of Rents, dated May 12, 2008, annexed to the Complaint as Ex. C.) These were executed subsequent to the CEMA and do not appear to be relevant to the present action.

DISCUSSION

A. Legal Standard

"In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff." Knox v. Countrywide Bank, 4 F. Supp. 3d 499, 506 (E.D.N.Y. 2014) (citing Operating Local 649 Annuity Tr. Fund v. Smith Barney Fund Mgmt. LLC, 595 F.3d 86, 91 (2d Cir. 2010)). "'In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must allege a plausible set of facts sufficient to raise a right to relief above the speculative level.'" Id. (quoting Operating Local 649 Annuity Tr. Fund, 595 F.3d at 91). "A claim has 'facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged.'" Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). However, "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." Iqbal, 556 U.S. at 678.

Additionally, "where a case concerns allegations of fraud or mistake under Rule 9(b) of the Federal Rules of Civil Procedure, claims must be pled with particularity." Knox, 4 F. Supp. 3d at 506. "Generally, to comply with Rule 9(b)'s specificity requirements, 'the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" Id. (quoting Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290 (2d Cir. 2006)).

Finally, "[a] document filed *pro se* is to be liberally construed . . . and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (internal citation and quotation marks omitted). Nonetheless, pro se complaints must '"be supported by specific and detailed factual allegations sufficient to provide the court and the defendant with a fair understanding of what the claimant is complaining about and whether there is a legal basis for recovery.'" In re Residential Capital, LLC, No. 12-12020, 2015 WL 4040506, at *8 (Bankr. S.D.N.Y. June 30, 2015) (quoting Kimber v. GMAC Mortg., LLC (In re Residential Capital, LLC), 489 B.R. 489, 494 (Bankr. S.D.N.Y. 2013)) (internal marks omitted).

B. State Law Claims

In this action to quiet title, plaintiff argues that assignments from MERS to defendant are invalid, and that any instrument that has been so assigned is "null and void."[6] (Compl. ¶¶ 15, 19(1).) Defendant argues, inter alia, that plaintiff lacks constitutional and prudential standing to challenge assignment. (Defendant's Memorandum of Law in Support, dated May 15, 2015 ("Def.'s Mem."), at 9-11.) Defendant is correct.

"The 'irreducible constitutional minimum of standing' under Article III of the Constitution includes the requirement that 'the plaintiff must have suffered an injury in fact . . . which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or

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6 While this action is most accurately construed as a challenge to assignments involving MERS, plaintiff does not provide facts indicating the history of such assignments and does not identify which specific assignments he seeks to challenge.

hypothetical.'" Rajamin v. Deutsche Bank Nat'l Tr. Co., 757 F.3d 79, 85 (2d Cir. 2014) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Here, plaintiff fails to allege a plausible injury stemming from the assignment. Plaintiff does not dispute that he has received loan proceeds. Nor does he allege that, as a result of the assignment, he has been subjected to excessive or duplicative billings.[7] See Obanya v. Select Portfolio Servicing, Inc., No. 14 CV 5255, 2015 WL 5793603, at *7-8 (E.D.N.Y. 2015); Ocampo v. JP Morgan Chase Bank, N.A., 93 F. Supp. 3d 109, 115-18 (E.D.N.Y. 2015); Barnett v. Countrywide Bank, FSB, 60 F. Supp. 3d 379, 388-90 (E.D.N.Y. 2014); Zutel v. Wells Fargo Bank, N.A., No. 12 CV 3635, 2014 WL 4700022, at *3-6 (E.D.N.Y. Sept. 22, 2014); Boco v. Argent Mortg. Co. LLC, No. 13 CV 1165, 2014 WL 1312101, at *3-5 (E.D.N.Y. Mar. 31, 2014).

Plaintiff also fails to satisfy the prudential elements of standing. "The 'prudential standing rule . . . normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.'" Zutel, 2014 WL 4700022, at *5 (quoting Rajamin, 757 F.3d at 86). While plaintiff vaguely challenges the ability of MERS to effect assignment, he fails to allege that he has been a party to, or a third-party beneficiary of, any such assignment. See, e.g., Zutel, 2014 WL 4700022, at *5; Boco, 2014 WL 1312101, at *3; Tamir v. Bank of New York Mellon, No. 12 CV 4780, 2013 WL 4522926, at *3 (E.D.N.Y. Aug. 27, 2013). Therefore, to the extent that a theory of defective assignment largely underlies plaintiff's quiet title claim, plaintiff lacks standing.

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[7] Although not alleged in the complaint, plaintiff alleges in his opposition that he has been "deprived of the right to cure by paying the 'lender.'" (Plaintiff's Memorandum in Opposition, dated June 25, 2015, at 27.) This is highly implausible, as plaintiff does not allege that any other entity has sought to collect. See Rajamin, 757 F.3d at 85.

Plaintiff also seeks a declaration barring defendant from commencing a foreclosure action. (See Compl. ¶ 19(2).) However, this claim is not justiciable. '"New York state courts have found that no justiciable controversy exists for claims seeking a declaratory judgment of rights or ownership of a mortgage if no foreclosure proceedings have been commenced."' Obanya, 2015 WL 5793603, at *8 (quoting Ocampo, 93 F. Supp. 3d at 115-16); see also Acocella v. Bank of New York Mellon, 9 N.Y.S. 3d 67, 68-69 (2d Dep't 2015); Jahan v. U.S. Bank Nat'l Ass'n, 9 N.Y.S. 3d 65, 65-66 (2d Dep't 2015). Plaintiff does not allege that defendant has commenced foreclosure proceedings. Consequently, plaintiff's request for a declaratory judgment does not state a viable cause of action. (See, e.g., Plaintiff's Memorandum in Opposition, dated June 25, 2015 ("Pl.'s Mem."), at 23 (citing Bank of New York v. Silverberg, 926 N.Y.S. 2d 532 (2d Dep't 2011).)

Additionally, defendant correctly notes that "[p]laintiff merely states in a conclusory fashion that the Note and Mortgage were 'fraudulently obtained.'" (Def.'s Mem. at 5; see Compl. ¶ 14.) Plaintiff fails to elaborate on this claim or to address the elements of the cause of action, and neither the pleading nor plaintiff's opposition papers provide the court with a clear understanding of the substance and logic of plaintiff's fraud theory.[8] (See Plaintiff's Affidavit in Support of His Opposition, dated June 25, 2015 ("Pl.'s Decl."), ¶ 37, annexed to Pl.'s Mem.; Pl.'s Mem. at 14-17); see generally Knox, 4 F. Supp. 3d at 508-09 (dismissing

[8] Plaintiff further alleges that "the assignment to Mers was attempted as a means of concealing assets in violation of the New York Fraudulent Transfer and Concealment Act NY Debtor Creditor Law §§ 270 to 281" and that defendant's conduct violates "the recording statutes and New York Consumer protection statutes." (Compl. ¶¶ 14,19(2).) These allegations are similarly deficient.

plaintiff's legal conclusion that defendant was not the "holder in due course" of the relevant note as based on an erroneous interpretation of New York law).

Plaintiff also alleges that the CEMA is "UNSIGNED" and "barred by the doctrine of the statute of frauds." (Compl. ¶ 14 (emphasis in original).) However, this allegation is largely contradicted by documents that plaintiff has attached to the complaint. The CEMA and the Amended Note available to the court bear plaintiff's signature.[9] (See CEMA at 33; Amended Note at 40.) While the Consolidated Mortgage is unsigned,[10] this is not a cognizable basis for this action. See Herbert v. HSBC Mortg. Servs., No. 13 CV 322, 2014 WL 3756360, at *9 (E.D.N.Y. June 30, 2014) ("[A] suit to quiet title does not arise when 'the invalidity will necessarily appear in any proceeding taken to enforce title under it."') (quoting Townsend v. City of N.Y., 77 N.Y. 542, 546 (1879)). Moreover, the court cannot adjudicate the hypothetical question of whether plaintiff may have a meritorious defense to a foreclosure by defendant.[11] See Obanya, 2015 WL 5793603, at *8. Accordingly, I respectfully recommend that defendant's motion to dismiss be granted.

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[9] It is unclear whether plaintiff intends to argue that his signature has been forged. (See Pl.'s Mem. at 11.) If so, this bare conclusion is not entitled to an assumption of truth. See Ocampo, 93 F. Supp. 3d at 118-19.

[10] Defendant alleges that "the copy of the Mortgage that Plaintiff attached to the Complaint is missing two pages, which are publically available on ACRIS, and bear both Plaintiff's signature and the signature of a Notary Public." (Def.'s Mem. at 7.) In support, defendant has submitted a copy of a mortgage on the Property, dated December 20, 2005, securing a promissory note in the principal amount of $15,278.15. (Mortgage, dated Dec. 20, 2005, annexed to the Declaration of Kevin P. Potere, Esq., dated May 15, 2015, as Ex. B.) This instrument is signed by plaintiff and notarized. (Id. at 20, 21.) It is not clear whether this is the instrument to which plaintiff refers.

[11] Plaintiff requests that "the conduct of Defendant[] . . . in the concealment of assets and predatory lending be deemed evidence of unclean hands." (Compl. ¶ 19(2).) Unclean hands is not an affirmative basis for relief. See 27A Am. Jur. 2d Equity § 98.

C. Leave to Amend

Plaintiff requests leave to amend the complaint, seeking to add or supplement claims of common law fraud, slander of title, and deceptive practices pursuant to New York General Business Law § 349. (Pl.'s Decl. ¶¶ 27, 28, 30.) Defendant opposes this request, arguing, inter alia, that these claims are time-barred. (See Defendant's Memorandum of Law in Further Support, dated Aug. 17, 2015, at 8-10.) Leave to amend should be freely granted when justice so requires. FED. R. CIV. P. 15(a)(2). "This relaxed standard applies with particular force to *pro se* litigants." Pangburn v. Culbertson, 200 F.3d 65, 70 (2d Cir. 1999). "It is well-settled, though, that courts will not grant leave to amend when any amendment would necessarily be futile." Adams v. Sheehan, No. 13 CV 5401, 2015 WL 58533, at *4 (E.D.N.Y. Jan. 5, 2015) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

Given the vagueness of plaintiff's allegations, the court declines to speculate as to when plaintiff's causes of action accrued, although it notes that the CEMA was executed more than eight years before plaintiff brought this lawsuit. See, e.g., Gaidon v. Guardian Life Ins. Co. of Am., 750 N.E.2d 1078, 1083-84 (2001) ("accrual of a section 349(h) private right of action first occurs when plaintiff has been injured by a deceptive act or practice"). Still, regardless of the causes of action in which plaintiff now packages his largely duplicative allegations, the court looks to his underlying request for relief, which he has not substantively altered. As explained, in the context of this affirmative action, the court cannot adjudicate the hypothetical question of whether defendant is equitably fit to foreclose or whether it has standing to commence a foreclosure action. See Obanya, 2015 WL 5793603, at *8; see also Acocella, 9 N.Y.S. 3d at 68-69; Jahan, 9 N.Y.S. 3d at 65-66. Accordingly, I respectfully recommend that plaintiff's request for leave to amend the complaint be denied.

CONCLUSION

For the reasons stated above, I respectfully recommend that defendant's motion to dismiss the complaint pursuant to FED. R. CIV. P. 12(b)(6) be granted, and that plaintiff's request to amend the complaint be denied. Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with courtesy copies to Judge Garaufis and to my chambers, within fourteen (14) days. Failure to file objections within the specified time waives the right to review. See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72, 6(a), 6(e).

Respectfully submitted,

/s/

ROBERT M. LEVY
United States Magistrate Judge

Dated: Brooklyn, New York
January 28, 2016